Supreme Court, U.S.
FILED
JUL 28 2005
OFFICE OF THE CLERK

No. 05-262

In The

Supreme Court of the United States

AMANDA DUTTON,

Petitioner,

v.

UNIVERSITY HEALTH CARE SYSTEMS, L.L.C. D/B/A TULANE UNIVERSITY HOSPITAL AND CLINIC,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Fed. R. Civ. P. 56 require the name of an affiant be included on a witness list in order for the affidavit evidence to be used in support of an opposition memorandum to a summary judgment motion?

2. Under the Family Medical Leave Act, 29 U.S.C. § 2615 *et seq.* (1993), is direct evidence of discriminatory intent required to avoid summary judgment for the employer?

3. Under the Americans With Disabilities Act, 42 U.S.C. § 12203(b) (1990), is evidence of the employer's mendacity regarding the reasons given for an employee's termination, sufficient to avoid summary judgment in regard to an employer's perception of a disability?

LIST OF PARTIES

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is unreported and attached as appendix 1-19 as are the opinions of the United States District Court for the Eastern District of Louisiana, which are appendix 20-56.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit entered on April 29, 2005, by Writ of Certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutes construed are the Family Medical Leave Act, 29 U.S.C. § 2615 *et seq.* which states: "It shall be unlawful for an employer – (1) . . . to discharge any individual or otherwise discriminate against any individual . . . because of such";

The Americans with Disabilities Act, 42 U.S.C. § 12203 *et seq.*, which states: "it shall be unlawful to . . . interfere with any individual in the exercise of . . . any right protected under this chapter";

The Equal Employment Opportunity Commission Interpretative Regulations, 29 CFR pt. 1630 App. § 1630(2) which states: "if an employer cannot articulate a non-discriminatory reason for the employment action, an

inference that the employer is acting on the basis of "myth", fear, or stereotype can be drawn"; and

Fed. R. Civ. P. 56(e) which states: "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein ... affidavits ... must set forth specific facts showing that there is a genuine issue for trial."

STATEMENT OF THE CASE

The United States District Court for the Eastern District of Louisiana found that Petitioner, Amanda Dutton, despite creating a genuine issue of material fact regarding the truthfulness for the reasons given for her termination, failed to produce evidence of discriminatory or retaliatory intent for her use of the Family Medical Leave Act (FMLA) (App. 52). The Court disregarded Dutton's evidence of pretext, and medical documentation stating Dutton could not work during her FMLA leaves. The Court concluded Dutton failed to prove Tulane regarded her as having a disability (App. 40). Lastly, the Court struck the affidavit of Rose Klein. The affidavit stated Mary Failla, Dutton's and Klein's supervisor, discouraged Klein's use of the FMLA which was needed to have knee replacement surgery. The Court failed to consider the affidavit as evidence, because Klein's name had not been timely listed on the witness and exhibit list submitted for trial (App. 25). The United States Court of Appeals for the Fifth Circuit concurred with the District Court's Opinion. (App. 13, 14, 17).

Facts

Petitioner, Amanda Dutton, worked as a collection supervisor for Tulane Hospital, a hospital owned by HCA, Inc. In June of 2001, Dutton underwent an appendectomy, myomectomy, and removal of endometriosis, all major surgical procedures. Returning to work in August of 2001, Dutton, without prior warning, received written disciplinary action for alleged poor performance. These alleged examples of poor performance were found while Dutton was on leave. During Dutton's leave, Mary Failla, Dutton's supervisor and the Director of Tulane's Business Services, failed to assign an employee to collect Dutton's accounts, accounts which numbered over 1100 upon Dutton's return. Due to complications from her June surgery, Dutton underwent medical tests in October of 2001, causing the use of additional FMLA leave for one week. Less than two months after this second leave, Failla terminated Dutton, citing the number of uncollected accounts left in Dutton's file tracks as the reason.

Dutton presented several pieces of evidence to refute Tulane's defense of Dutton's poor performance. Failla left Dutton's accounts uncollected while she was on leave; Dutton's counterpart, collection supervisor Sarah Lewis, performed at a lower level than Dutton, and was not disciplined; Dutton had no previous written warnings or disciplinary actions regarding her work in her personnel file; the affidavit of Rose Klein, stating Failla discouraged Klein from taking FMLA leave because she was needed at work; and the Department of Labor's investigative determination, concluding that

Dutton had been the victim of retaliation and discrimination under the FMLA.[1] (App. 12-13; App. 58-60).

The United States Court of Appeals for the Fifth Circuit, without the affidavit of Rose Klein, agreed that Dutton produced evidence to create a genuine issue of material fact regarding the truthfulness of Tulane's reasons for terminating her employment, but failed to produce evidence that Tulane discriminated against her for using the FMLA. Further, the Fifth Circuit concluded that Failla could not have perceived Dutton as having a disability because Failla did not regard Dutton as being prevented from working a broad range of jobs (App. 17).

REASONS FOR ALLOWANCE OF WRIT

Whether a district court should consider competent affidavit evidence in summary judgment proceedings even though the name of the affiant was not included on the witness and exhibit list for trial, is an important question implicating the way summary judgment motions are decided. Fed. R. Civ. P. 56(e) mandates that the affidavits used to counter motions for summary judgment need only be of personal knowledge and meet the standards under the evidence rules. However, the rule does not mandate that the name of the affiant be included on a witness list in order for the affidavit to be considered as evidence in summary judgment proceedings. The only purpose of the summary judgment rule is to enable a party to be freed from sham claims or defenses presented by her

[1] The District struck the report as evidence because the report had not been listed on the witness and exhibit list for trial (App. 25-26).

adversary, and from the expense and inconveniences of a trial. While Rule 56 is designed to efficiently resolve issues. Rule 56 was not designed to strip a person from his day in court when sufficient, relevant evidence has been produced to refute the motion. The application of Rule 56 must comport with due process and the Seventh Amendment. Failure to allow a party to use all evidence available to her under Rule 56 undermines the litigation process, especially since this Court has stated "[the] submission of countering affidavits is necessary to avoid summary judgment." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 161, 90 S.Ct. 1598, 26 L.Ed. 2d 142 (1970).

Likewise, it is important for this Court to clarify whether an employee who proffers evidence supporting the likely falsehood of the reason given for an adverse employment action, will defeat a summary judgment motion in claims alleging retaliation and discrimination under the FMLA and the ADA. Again, the permitted use of Rule 56 is at stake, particularly in employment cases, in w..ch proof of liability often depends on the credibility of witnesses. Summary judgment is only used to dispose of cases which lack a disputed material fact. If a reasonable person can disbelieve the only reason articulated by an employer for an adverse action taken against an employee in a protected class, that reasonable person can also infer the reason for the falsehood was to hide an unlawful motive. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 536, 113 S.Ct. 2742, 2763, 125 L.Ed. 2d 407 (1993). When a litigant produces evidence suggesting more likely than not unlawful action has taken place, summary judgment should not preclude a full trial or at the very least, the possibility of settlement.